

Opening Statement of the Honorable Greg Walden
Subcommittee on Communications and Technology
Hearing on “FCC Reauthorization: Oversight of the Commission”
March 19, 2015

(As Prepared for Delivery)

It was just over two weeks ago that we had the commission's Managing Director present us with his rationale for the largest budget request in history for the FCC. We were able to discuss with him whether the funding levels requested would actually yield an effective and credible agency. Today we have the opportunity to ask the commissioners themselves whether this agency is functioning as it should -- whether it is producing the high-caliber policymaking that the American society requires and deserves. I, for one, am skeptical that this is the case.

I think I have good reason for my skepticism. The Federal Communications Commission was once a transparent and predictable agency presiding with a light-touch over an explosion of mobile and Internet investment and innovation that has greatly benefited consumers. Today that agency has devolved into a place where statutory obligations are left to languish in favor of scoring political points.

The agency's capitulation to the president's demands comes at the end of a proceeding mired in procedural failures and the White House's behind-the-scenes influence on the FCC's process has been well documented by the Wall Street Journal and through emails from Senator Harry Reid's office last May.

It is the responsibility of an expert independent agency to issue detailed notice to the public when it intends to act and to apply its expertise to resolve the hard questions of law and policy. This process should be transparent and every effort should be made to resist calls to politicize the outcome. Perhaps in this respect the FCC could learn something from the Federal Trade Commission -- an agency the FCC recently rendered moot in protecting ISP customers.

A properly functioning commission doesn't work behind closed doors with the president to bypass the administrative process and a properly functioning commission doesn't make decisions based on the number of click-bait emails that interest groups can generate. A properly functioning commission focuses on law and facts to generate thoughtful and legally sound analysis rather than being carried away by politically generated populist furor.

The Open Internet proceeding is not the only place where the FCC seems to have abandoned good process. I'm also concerned about the use of delegated authority. Commissioners have the responsibility for dealing with matters that are controversial or make new policy and should not simply delegate a decision to bury the result. I am concerned that transparency has suffered between the commissioners; a lack of agreement should not mean that decisional documents are kept from other commissioners until the eleventh hour. And I'm concerned that an excessive number of practical proceedings remain unresolved -- and thousands of businesses wait in the wings -- while the commission focuses on extending its regulatory reach.

But mostly, I'm concerned that the FCC oversteps its jurisdiction too regularly. Net neutrality is the obvious example here, but there are others. An agency only has the authority given to it by statute, and I cannot see how any reading of the Communications Act would give the impression that Congress granted the FCC authority to be the ultimate arbiter of the use of personal information; I cannot see how the Telecommunications Act could be read to gut the 10th Amendment and place the FCC in the position of deciding how states can spend tax dollars; and I cannot see how the FCC could possibly interpret its governing statutes to wrest control of content from the creators and mandate its presentation on the Internet.

But for the fact that I only have five minutes for my statement, we could keep doing this all day. A bidding credit waiver for Grain Management; government researchers in newsrooms; adopting treble damages without notice; excessive and unfounded merger conditions; and last minute data dumps into the record. The FCC appears to believe that it is authorized to take the Potter Stewart approach to its authority: "I know it when I see it."

To be fair, some of the responsibility here lies with Congress. We haven't updated the Communications Act for decades, and technology has out-evolved its regulatory framework. The FCC doesn't have the tools to do its job. But this doesn't mean that the agency should distort or ignore the current law or worse threaten to manufacture authority in whole cloth should regulated industries have the temerity to resist the commission's demands. Instead, it should work with Congress. We have offered a way forward on net neutrality that is more certain and less costly for society, and it's not clear to me that the objections to our legislation are based on policy. But if we could work together on fixing the net neutrality situation, I think we would be able chalk up a victory for all of us, for all consumers, and for the American economy.

It starts today with trying to fix the agency itself.

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